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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALAN STRANG, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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1. THE AUDIT ISSUE. The National Labor Relations Board ("Board") admits that a conflict exists between the decisions of the court below and the District of Columbia Circuit concerning the requirement that unions must have their financial records audited by an independent certified public accountant before they may demand compulsory fees from nonmembers. Opposition to the Petition ("Opp.") 20; *compare IAM v. NLRB*, 133 F.3d 1012, 1016-18 (7th Cir. 1998) (reprinted at Petitioners' Appendix ("Pet. App.") 1a), *with Ferriso v. NLRB*, 125 F.3d 865, 867-72 (D.C. Cir. 1997); *see also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18, 310 (1986). Nevertheless, relying upon several faulty grounds, the Board argues that the Petition should be denied and the audit issue not resolved "at the present time." (Opp. 20).

a). First, the Board defends its refusal to require independent audits by claiming that *Hudson* never "require[d] that unions

secure independent audits." (Opp. 18). But this claim strains *Hudson* and its progeny to the breaking point.

In *Hudson*, 475 U.S. at 307 n.18 (emphasis added), this Court held that "adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor*." The Court recognized that nonmembers need verified and audited financial disclosure, prior to any agency fee collections, to adequately protect their statutory and constitutional rights to refrain from supporting causes and candidates they abhor. *Id; see also* 475 U.S. at 304 nn.12 & 13 and accompanying text. The Court could scarcely have been clearer, as the lower courts have recognized with virtual unanimity.[1]

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[1] The Board claims that the many lower court decisions which relied upon *Hudson* to mandate independent CPA audits were merely spewing dicta, (Opp. 19 n.9), but this claim is absurd. For example, *Hohe v. Casey*, 727 F. Supp. 163, 165-66 (M.D. Pa. 1989), held that a union violated the law when its CPA audited only the basic financial statements, not the union's breakdown of chargeable versus nonchargeable expenses. Surely the court would not have issued such a ruling concerning the adequacy of a particular type of CPA's audit if *no audit was required at all!* Similarly, *Gwirtz v. Ohio Education Association*, 887 F.2d 678 (6th Cir. 1989), was a challenge to the level of CPA audit service provided by the union. The court reviewed the prior Sixth Circuit law and stated:

> This court in *Tierney* [*v. City of Toledo*, 824 F.2d 1497, 1506 (1987)] found the procedure for the collection of fair share fees from the nonmembers to be constitutionally infirm under *Hudson* because nonmembers were not, prior to the collection of fees from them, provided with detailed financial information concerning all major categories of union expenses *that had been audited by an independent certified public accountant.*

Gwirtz, 887 F.2d at 681 (emphasis added). Later, the Sixth Circuit in *Tierney v. City of Toledo*, 917 F.2d 927, 936 (1990), ordered an evidentiary hearing into "whether the auditor utilized adequate procedures to verify the expenditures." Again, why would the court have ordered such a hearing if *no* auditor was required? *See also Mitchell v. Los Angeles Unified Sch. Dist.*, 739 F. Supp. 511, 514-15 (C.D. Cal 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir.), *cert. denied*, 506 U.S. 940 (1992) (challenge to the type of CPA audit).

Backtracking from its claim that *no* audit of any kind is required, the Board next argues that even if some audit is required, *Hudson* "did not purport to establish a general rule mandating that unions *hire CPAs to audit the financial information that they are required to disclose to nonmembers.*" (Opp. 19, emphasis added). But no other reading of *Hudson* makes sense, for the entire purpose and utility of an audit requirement would be undermined if the auditor is someone other than an independent CPA, *e.g.*, a paid union official whose sole allegiance to the union is unquestioned.[2] *Hudson*, 475 U.S. at 310 (the union would be entitled to immediate access to the objector's funds, without an escrow arrangement, if the original disclosure "had included a certified public accountant's verified breakdown of expenses"); *Ferriso*, 125 F.3d at 870-72; *Tierney*, 917 F.2d at 936 ("Disclosure of the major categories of expenses and the methodology of the agency fee calculations means very little if the non-members cannot have some level of confidence in the verification of the expenditures").[3]

In *Hudson*, this Court rejected the requirement of a full-blown evidentiary hearing prior to the seizure of agency fees from nonmembers. 475 U.S. at 308 n.21. However, as an alternative method of protecting nonmembers' rights, the Court required unions to procure independent CPA audits of their financial statements, in order to provide an independent and trustworthy check on the unions' otherwise unfettered ability to

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[2] The IAM's "Grand Lodge Auditors" are union members in good standing selected by the IAM's Secretary-Treasurer, and their salaries are derived from the dues and agency fees of members and nonmembers. (App. B 58a-63a; App. C 217a-25a; TR 155-74). Despite their titles, these "Grand Lodge Auditors" are neither licensed accountants nor certified public accountants. They receive little formal training in accounting. (App. B 58a-63a; App. C 217a-25a; TR 406, 411-12, 466).

[3] The Board studiously ignores the fact that the union's internal "audits" were only done for a "sample" of ten of the IAM's thousands of local and district unions, so that nonmembers got *no* disclosure about the expenditures of their own local unions. (TR 261-65; Pet. App. B 58a-63a; Joint Ex. 8). Thus, the Board's decision not only does away with the audit requirement in general, but also with the requirement that nonmembers receive disclosure concerning their own local union. *But see Hudson*, 475 U.S. at 306-07.

seize any amount of agency fees they unilaterally choose. *Id.* at 304 nn.12 & 13 & accompanying text, & 307 n.18. Without such an independent, pre-collection check, nonmembers are essentially thrown to the wolves, as unions will have the power to calculate unilaterally—and then seize—any amount of dues and fees that they choose. While the nonmembers may have a post-collection lawsuit as a possible recourse, this Court is well aware that a statute which permits a private party (the IAM) to seize another's property without any independent pre-collection check carries with it the gravest due process and First Amendment implications. *See generally Connecticut v. Doehr*, 501 U.S. 1 (1991); *see also Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-203 (1944); *IAM v. Street*, 367 U.S. 740, 795-96 (1960) (Black, J., dissenting).

The Board also claims that "the procedures required to protect the constitutional rights of objectors in the public sector, including those defined and elaborated on in *Hudson* ... were not formulated to comport with a union's obligation under *Beck* to represent its employees fairly." (Pet. App. 59a-60a). However, this Court's jurisprudence protecting nonmembers from excessive union fee seizures has not significantly varied based upon whether the employee works in the public or private sector. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977) ("the differences between public and private sector collective bargaining *simply do not translate into differences in First Amendment rights*") (emphasis added); *Communications Workers v. Beck*, 487 U.S. 735, 745-46 (1988) (agency fee decisions under the Railway Labor Act "controlling" under the NLRA); *see also Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1420 (D.C. Cir. 1997), *aff'd*, ___ U.S. ___, 118 S. Ct. 1761 (1998); *Nielsen v. IAM*, 94 F.3d 1107, 1113 (7th Cir. 1996) (the procedural protections mandated by *Hudson* "have come to be recognized as appropriate for *Beck* cases as well"). Even assuming, *arguendo*, that this case has no constitutional underpinnings, the IAM owes the nonmembers a substantial fiduciary obligation, *Teamsters v. Terry*, 494 U.S. 558 (1990), which may not be discarded simply because the Board wishes to baldly categorize

this case as "non-constitutional."[4] Pet. App. 17a-26a; *but see Hudson*, 475 U.S. at 306 ("*basic considerations of fairness*, as well as concern for the First Amendment rights at stake" mandate adequate financial disclosure) (emphasis added).[5]

In short, this Court has required union financial statements to be *"verifi[ed] by an independent auditor,"* *id.* at 307 n.18, and this requirement would be defeated unless the auditor is truly independent and capable of verifying the books and records in a way that will engender trust among nonmembers. This is a role especially suited for a CPA, not a paid employee of the very union under scrutiny. *Ferriso*, 125 F.3d at 870-72.

b). The Board also argues that the writ should be denied because the circuit split over the audit issue presents only a "relatively narrow conflict." (Opp. 20). But this "relatively narrow conflict" has practically paralyzed the Board's decision making, as witnessed by the belated and standardless remands issued by the Board in similar cases. *E.g.*, *Laborers' Local Union No. 1168 (Work Services Corp.)*, Case No. 16-CB-4316 (April 20, 1998) (reprinted at Opp. 10a). Similar issues are presented in several other pending NLRB cases, thus necessitating a ruling by this Court to provide guidance to the Board, the parties and the lower courts. *See, e.g. Teamsters Local 166 (Dyncorp Support Services Operations)*, Case Nos. 31-CB-8333, 31-CB-8683 & 31-CB-8938; *Television Artists-AFTRA (KGW Radio)*, Case No. 36-CB-1491.

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[4] Several lower courts have recently commented upon the power of the state in the creation and enforcement of compulsory dues requirements, and the possibility of "state action" in these arrangements. *Miller v. Air Line Pilots Ass'n*, 108 F.3d at 1419-20; *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 987-88 (7th Cir. 1997); *Bloom v. NLRB*, ___ F.3d ___, 1998 WL 455632, n.2 (8th Cir. Aug. 7, 1998).

[5] The IAM, like most large international unions, represents employees in both the public and private sectors, (CPT Exs. 5, p. 4; 9, p. 3), so it is already required to comply directly with *Hudson's* "constitutional" requirements in some of its bargaining units. *See, e.g., Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987) (United Auto Workers must establish procedures to comply with *Hudson* for its public sector bargaining units).

Indeed, the instant case has been pending before either the NLRB General Counsel or the Board itself for well over a decade. (Pet. App. 314-15; *Strang v. Collyer*, 710 F. Supp. 9 (D.D.C. 1989), *aff'd*, 899 F.2d 1268 (D.C. Cir. 1990)). The resulting Board decision, *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), was designed to be the Board's lead case on these issues. Yet, over three years after its issuance, the Board still has no firm direction about how to proceed in this and related cases.

Finally, the issue itself is not nearly as narrow as the Board would have the Court believe. While the agency fee cases have not engendered a huge volume of litigation, those cases which have been litigated often turn on the adequacy of the financial disclosure or the propriety of the audits conducted. *Ferriso v. NLRB; Hohe v. Casey*, 727 F. Supp. at 165-66; *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d at 680-83; *Tierney v. City of Toledo*, 824 F.2d at 1506, *further proceedings*, 917 F.2d at 936; *Mitchell v. Los Angeles Unified Sch. Dist.*, 739 F. Supp. at 514-15. This issue will certainly recur. The Court should grant the writ to make it clear that audits by CPAs are required in order to provide nonmembers with some degree of pre-collection assurance that their property will not be seized by the union in an arbitrary and unfettered manner.

2. THE CHARGEABILITY OF EXTRA-UNIT LITIGATION. In its decision, the Board acknowledged that it was refusing to follow *Ellis v. BRAC*, 466 U.S. 435, 453 (1984) and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 528 (1991), which held that litigation expenses without a direct connection to the nonmembers' bargaining unit are not chargeable to them. (Pet. App. 52a). "We find precedent grounded in constitutional considerations not to be binding..." *Id.* Member Cohen dissented from this holding. (Pet. App. 55a, n.78).

In its Brief, however, the Board shifts gears and claims that its ruling is "consistent with the general principle that this Court described in *Ellis*" and *Lehnert*, (Opp. 15), and that Petitioners "misinterpret[]" these cases. (Opp. 14). The Board cannot have it both ways.

Ellis unanimously held that nonmembers need only pay for union litigation "that concerns bargaining unit employees," finding that "[t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." 466 U.S. at 453. The *Lehnert* plurality opinion held that, while "precedent established through litigation on behalf of one unit may ultimately be of some use to another unit," when "unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative." 500 U.S. at 528. These decisions wisely attempted to draw a bright line, in order to stave off annual challenges to each and every union litigation expenditure. As the Court of Appeals for the Tenth Circuit noted, "the *Ellis* case makes no exception for litigation that helps the union in a general way or that benefits other bargaining units represented by the union. In order for litigation expenses to be charged to a bargaining unit, the litigation must concern the members of the bargaining unit." *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1130 (1991).

Contrary to the Board's suggestion that this Court has never before faced this issue, (Opp. 15), the Court in *Ellis* directly reviewed litigation related to collective bargaining in other units. For example, the "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings" held nonchargeable in *Ellis*, 466 U.S. at 453, was "intervention in an employer's bankruptcy proceedings [that] protected the union members' wages and ensured continued compliance with the collective bargaining agreement while the employer underwent reorganization." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982), *rev'd in pertinent part*, 466 U.S. 435 (1984). Similarly, "defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly is "a normal incident of the duties of the exclusive representative," but was held nonchargeable by *Ellis*, 466 U.S. at 453, unless the nonmembers' "bargaining unit is directly concerned."

Thus, far from taking a position "consistent with the general principles" of *Ellis* and *Lehnert*, (Opp. 15), the Board's decision directly conflicts with those decisions. *Ellis* stands foursquare for the proposition that nonmembers do not have to fund

litigation that does not directly relate to their unit, even if the union and the Board can stretch to claim that "litigation involving the meaning of provisions in other contracts" might later be useful precedent for the nonmembers' unit. (Pet. App. 53-54, n. 75). Subjective and *ad hoc* exceptions swallow the rule, for surely all precedents created through litigation will be of some benefit to some other litigants somewhere.

This is particularly true given the record in this case, which shows that the IAM charged nonmembers for more than $3.3 million of its extra-unit litigation, and conceded that only $159,900 was nonchargeable. (RUX 1, tab 13 ¶¶ 126-29 & Schedule 12). The Board's vague standard for "chargeable" litigation allowed the IAM to charge nonmembers for: Department of Transportation route transfer proceedings concerning Aeromexico; bankruptcy litigation concerning NLRA and RLA units; National Mediation Board election procedures; a suit against the Secretary of the Navy over his decision to award a contract to a private employer; defense of a sex discrimination suit; and more than $580,000 spent in litigation over the Eastern Air Lines strike (and secondary boycott litigation, injunctions and bankruptcy cases related to that strike). *Id.*

The Board is wrong to claim that such charges were not an issue in this case. (Opp. 17). It is true that the Board did not directly pass upon these specific litigation expenditures or divide them into chargeable and nonchargeable categories. However, they were in the record and the Board expressed no disagreement with the union's allocation of these expenditures in light of the standard that it utilized.[6]

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[6] The General Counsel's Complaint alleged that "Respondent Unions have charged non-members ... for ... expenses not attributable to Respondent Unions' representation of the objecting non-member's bargaining unit," (Final Amended Consolidated Complaint, p. 12). The IAM conceded that it charged "litigation and agency proceedings" across all bargaining units "(1) when they are incident to internal governance; or (2) when they are incident to the negotiation and administration of a collective bargaining agreement and concern unit employees and are normally conducted." (Exhibit RU-2, p. 5; TR 384).

In short, the Court should grant the writ to decide whether the Board majority was correct in refusing to follow *Ellis* by allowing extra-unit litigation to be charged to all nonmembers regardless of the bargaining unit relationship.

3. THE CHARGEABILITY OF OTHER EXTRA-UNIT ACTIVITIES. The Board hides the actual—and most egregious—effect of its ruling: that American workers in the private sector are now required to support collective bargaining in foreign nations, as well as among public sector and railroad and airline employees, if that is what the union chooses to do with its compulsory dues. (Opp. 12-13).

The Board specifically permits IAM to "pool" resources across all bargaining unit lines "whether the contributing units are in the same industry in the same State, in different industries in Canada and the United States, or in different States with different collective bargaining laws within the United States." (Opp. 12). Thus, the Board's decision erases the concept of "bargaining units" from the NLRA (at least where compulsory dues seizures are involved), and removes virtually all limits on IAM's ability to force compulsory support of collective activities in foreign countries and in public sector and railroad bargaining units—no matter how unrelated those activities are to each Petitioner's own bargaining unit. But, in passing the NLRA, Congress could not possibly have intended this result, which cries out for the exercise of this Court's supervisory authority.

In reaching a result that forces workers in the private sector to subsidize foreign, public sector and railroad bargaining units — or be discharged — the Board ignores the fact that the NLRA has no extra-territorial effect. Coverage is specifically limited to certain domestic employers and employees in discrete and identified bargaining units. *See, e.g.*, 29 U.S.C. §§ 152 (2), (3) and (6). Simply stated, foreign employees, public sector employees and railroad employees are not covered by the NLRA, and they are certainly not entitled to largesse seized from

the salaries of unwilling private sector workers under color of that statute.[7]

Moreover, the Board's decision goes far beyond anything contemplated by this Court in *Lehnert*. Although *Lehnert* upheld the chargeability of some extra-unit expenditures, it did require some relationship between the objecting nonmembers' bargaining unit and the union's extra-unit expenditures. "There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." 500 U.S. at 524. But there is not a scintilla of evidence in the record even hinting at the notion that IAM's efforts in its diverse bargaining units in Canada, or in the public or railroad sectors have an impact upon the bargaining units covered by the NLRA.

In short, the Court should grant the Petition to limit the extent to which employees covered by the NLRA can be forced to fund union activities in foreign and non-NLRA units.

CONCLUSION

The Court should grant the Petition in its entirety and schedule this case for full briefing and argument.

Respectfully submitted,

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[7] Disingenuous is the argument in Opp. 12-13, n.4, that "the dues paid to IAM by employees in petitioners' domestic bargaining units are assessed for the purpose of protecting those bargaining units, not for the purpose of 'representing Canadian bargaining units.'" The Board's decision explicitly permits the IAM to "pool" *all* of its resources across *all* unit lines without regard to nationality or labor laws. Thus, the dues that Milwaukee-based General Electric Medical Systems employees pay into the IAM's "pool" can be used to "protect" Canadian and public sector employees just as much as they "protect" General Electric Medical Systems' employees. Money is fungible, and there is nothing in the record to show that the IAM in any way segregates its foreign dues receipts and expenditures from its domestic ones.